APPENDIX E

BEFORE THE

Interstate Commerce Commission

Docket No. 31177

SEATRAIN LINES, INC. PETITION FOR DECLARATORY ORDERS

REPLY BRIEF OF SEATRAIN LINES. INC.

SEATRAIN LINES, INC.,
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Its Attorney.

March 6, 1953

Appendix E

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Opening Statement

By its order dated December 24, 1952, in Docket No. 31177, the Commission authorized the filing on or before January 30, 1953, of briefs in support of or in opposition to the relief sought by the petition of Seatrain Lines, Inc., for the issuance of declaratory orders, and the filing of replies thereto on or before February 20, 1953. The latter date was subsequently extended to March 6, 1953.

On January 30, 1953, a brief was filed on behalf of seven railroads and their subsidiaries, which are also the defendants in *Seatrain Lines, Inc.* v. *Pennsylvania Railroad Company, et al.*, Civil Action 1188/51, in the United States District Court for the District of New Jersey. Said railroads are hereinafter referred to as railroad defendants. On the same date, a separate brief was filed on behalf of the Association of American Railroads, the remaining defendant in the last-cited proceeding, hereinafter referred to as the Association.

The reply of Seatrain Lines, Inc. is directed almost exclusively to exposing misstatements and misrepresentations

contained in the briefs filed herein, to which this reply is directed, and in the joint brief filed by the railroad defendants and the Association with the United States Supreme Court. The last mentioned brief, filed almost coincidentally with the briefs herein, requests the Supreme Court to deny the writ of certiorari sought because, it is argued, the same issues as are contained therein are before this Commission. At the same time, the briefs filed herein, to which this reply is directed, urge the Commission to refuse to issue the declaratory orders sought because of the contention that the same issues involved therein are before the Supreme Court. The position of the railroad defendants and the Association, therefore, is that relief in all tribunals should be denied and the entire situation herein should remain unchanged in a complete vacuum.

Proper analysis of the misstatements and misrepresentations, as this reply brief endeavors to accomplish, should arrange the true and basic facts in their proper perspective and result in the inevitable concluion that the declaratory orders herein sought should be issued.

I. The Briefs, and the Prayers for Dismissal of the Petition for Declaratory Orders Contained Therein, Are Predicated Upon the Theory That the Issue as to Damages Raised Herein is Identical with That Involved in the Anti-Trust Case. That Theory, Being Contrary to Fact, Is Wholly Erroneous.

The principal argument advanced by the railroad defendants and the Association, in requesting the Commission not to issue the declaratory orders sought, is that the issues raised in the petition for the declaratory orders are the identical issues that constitute both the basis of Seatrain's appeal from the decision of the United States District Court for the District of New Jersey, in Civil Action 1188/51,

and its petition for a writ of certiorari, in connection therewith, to the United States Supreme Court.

The brief of the railroad defendants states:

> "In summary, then, there is now pending before the Third Circuit on appeal, and before the Supreme Court on petition for certiorari, proceedings which seek in those courts adjudication of the same issues presented here." (p. 9)
>
> "The issues raised by these two petitions are identical." (p. 11)
>
> "That these questions are concurrently presented to two tribunals is, of course, occasioned solely by Seatrain's deliberate choice." (p. 13)
>
> "It can only be a matter of embarrassment to the Commission to attempt, at this point, to deal with these precise questions which are pending before the courts." (p. 25)

In the brief of the Association it is stated:

> "We respectfully suggest that Seatrain's petition for declaratory orders amounts to no more than an invitation to the Commission to review the decision of the District Court." (p. 7)
>
> "It is no part of the Commission's function to review the decision of the District Court, and sound discretion would clearly call for declination of the invitation to do so." (p. 7)
>
> "Thus the very questions presented to the Commission by Seatrain's petition here for answer by declatory orders are pending before the Court of Appeals and are sought to be brought before the Supreme Court without awaiting judgment in the Court of Appeals." (p. 8)

> "In other words, according to its petition in the Supreme Court, Seatrain asks the Commission to make a gesture of futility." (p. 8)

Other than the basic argument advanced that the issues involved herein are identical with those in the court proceedings, the briefs of the railroad defendants and the Association are concerned wholly with procedural matters dealing with Section 5(d) of the Administrative Procedure Act. Even these procedural matters however, are interrelated with, are subordinate to, and actually flow from the principal contention that the issues raised in the petition herein are identical with the issues before the Appellate Federal Court in the anti-trust proceeding.

(A) The Question Before the Commission As to Its Jurisdiction to Award Damages Is Not the Same as the Issue Before the Federal Courts.

In its petition for the issuance of declaratory orders, Seatrain stressed the fact that the principal matter in the anti-trust proceeding, in so far as it was concerned, was the obtainment of injunctive relief, and the recovery of damages suffered from the concerted abuse of judicial and quasi-judicial procedures, in bad faith and without probable cause, for the purpose of injuring Seatrain.

The petition for the issuance of declaratory orders unmistakably indicated that the damages sought from the Federal Court, in the anti-trust proceeding, were those incurred prior to November 30, 1951, the date of the commencement of the New York-Savannah service under temporary authority issued by the Commission in *Seatrain Lines, Inc., Temporary Authority Application,* Docket No. W-543 (Sub-No. 2), mimeographed, decided November 13, 1951. The petition further emphasized that the damages sought where not those suffered from violations of the Interstate Commerce Act but from actions not prohibited by or

declared to be unlawful in said Act, such as the abuse of processes.

The petition for the issuance of declaratory orders, for purposes of illustration, contained examples of actions taken by the railroad defendants and the Association since November 30, 1951, which had caused Seatrain substantial damage. Several of these examples, in fact, were dealt with at considerable length in the anti-trust proceeding, for the purpose of illustrating the continuing nature of the conspiracy there alleged. These examples included the actions of the railroad defendants in the Federal Court at Alexandria, Virginia, in December, 1951, in connection with their petition to set aside the Commission's order granting Seatrain temporary authority to operate between New York and Savannah. *Alabama Great Southern R. Co.* v. *United States,* 103 F. Supp. 223.

Also cited to the Federal Court were the facts relating to the filing on March 26, 1952, by the railroad defendants, with the Commission, of the complaint in Docket No. 31014, and the representations, with respect to its purposes and scope, made to the United States District Court for the District of New Jersey.

The Commission's attention was called, in the petition for declaratory orders, to the actions of the railroad defendants in offering Exhibit 68, on May 9, 1952, in the manner and for the purpose stated by their counsel in *Seatrain Lines, Inc., Extension-Savannah,* Docket No. W-543 (Sub-No. 3).

These and other actions of the railroad defendants and the Association have caused Seatrain substantial damage, for which it is entitled to recover. Seatrain, by its petition for the issuance of declaratory orders, is seeking to determine whether the Commission has jurisdiction to award reparation for damages incurred by reason of such actions. The issue dealing with the Commission's authority to award

reparation for damages resulting from abuse of processes, as raised in the petition for the issuance of declaratory orders, is not limited to damages up to November 30, 1951, but, as a practical matter, pertains to damages suffered subsequent to that date, because the statute of limitations limits the Commission's authority to award reparation to a two-year period, as the defendants in the anti-trust proceeding informed the Federal Court.

As the damages sought from the Federal Court in the anti-trust proceeding were incurred prior to November 30, 1951, there is no pending issue before the Federal Court with respect to damages suffered by reason of actions of the defendants, such as those above cited, since November 30, 1951. It is in connection with damages suffered since November 30, 1951, and prior thereto in connection with only such damages as are permitted by the statute of limitations, that Seatrain is seeking the declaratory orders herein with respect to the Commission's jurisdiction. That order is sought so that Seatrain may proceed before the proper tribunal to recover damages suffered since November 30, 1951, as well as those suffered prior to that date which are not barred by the statute of limitations.

It thus is apparent, regardless of the interpretation to be placed upon the District Court's decision with respect to the question of damages, that the Court did not and could not have passed upon any question dealing with damages suffered by Seatrain since November 30, 1951. Therefore there is not now pending, in any other proceeding, any issue concerned with the Commission's authority to award reparation for damages suffered since November 30, 1951, as a result of abuse of processes such as depicted in the examples referred to above, all of which occurred since November 30, 1951. Accordingly, the principal contention of the railroad defendants and the Association, that the Commission should not pass upon this issue because it is before the Federal Courts, is wholly erroneous.

Furthermore, as was shown in the petition for declaratory orders, pages 6 to 10, the damages for which Seatrain is suing in the Federal Courts are based upon concerted actions and conspiracies of the defendants therein, in violation of the anti-trust statutes. The damage question is presented to the Federal Appellate Courts in that context, on review of the District Court's dismissal of that complaint. Clearly, damages that this Commission may award are entirely unrelated to the anti-trust statutes. Accordingly, the legal issues before the Federal Courts and this Commission are different and distinct and, of necessity, are wholly dissimilar, even in principle.

II. The Railroad Defendants and the Association Misconceive and Misstate (A) the Issues Involved in the Anti-Trust Proceeding As Well As (B) the Underlying Objective of the Petition for the Issuance of Declaratory Orders.

(A) The Railroad Defendants and the Association Misconceive and Misstate the Issues Involved in the Anti-Trust Proceeding.

The argument used by the railroad defendants and the Association in requesting the Commission to refuse to issue the declaratory order sought with respect to damages, namely, that such issue is before the Federal Courts, is based upon an alleged interpretation of the Federal Court's decision with respect to the matter of damages, which interpretation, in turn, is predicated upon a complete misconception and misstatement of the issues raised in and by the anti-trust proceeding.

On pages 14 and 15 of the brief of railroad defendants herein, after misstating the issues in the anti-trust proceeding, the following statements appear:

> "It [Seatrain] asked that the Court decide issues under the Interstate Commerce Act which had never

> been submitted to the Commission but which lie within its jurisdiction. Prior to argument and decision of motions to dismiss it modified its prayers for relief *somewhat*[1] but persisted in its decision to seek relief from the courts rather than from the Commission." (Italics supplied.)
>
> "It now seeks to enlist the support of the Commission in this attempt to invest the courts with regulatory authority over this important segment of our transportation system."

A similar misstatement is made to the Supreme Court in the joint brief filed by the railroad defendants and the Association in opposition to Seatrain's application for review filed with that Court, February 6, 1953, (attached hereto as Exhibit A). On pages 4 and 5 of that brief it is stated:

> "Seatrain, by its complaint below, sought to remove the whole controversy—a complex series of technical issues in transportation economics and commerce law —from the Interstate Commerce Commission to the district court and to have it dealt with under the antitrust laws rather than the Interstate Commerce Act."

The fact, of course, as the complaint shows, is that Seatrain did not ask the District Court to decide any issue under the Interstate Commerce Act. It asked only for damages and injunction under the anti-trust laws.

By their statements, the railroad defendants and the Association appear deliberately to be attempting to confuse the issue of damages with the issue of injunction as it was originally sought from the District Court against actions *done pursuant to the anti-trust conspiracy,* relating to sub-

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[1] See pages 11 and 12 herein.

ject matters within the regulatory jurisdiction of the Commission. But this latter issue was completely removed from the case before argument took place in the District Court, as railroad defendants and the Association acknowledge. The record before the Commission shows that this is precisely what took place:

In their brief dated April 1, 1952, filed with the District Court in support of their motion to dismiss Seatrain's complaint (see pp. 32 and 33 thereof) they made the same argument, concluding as follows:

> "Rarely, if ever, has a plaintiff made so bold a demand that a federal court by its writ of injunction arrogate to itself the regulatory functions committed by the Congress to the Interstate Commerce Commission."

Seatrain focused attention upon these misstatements of the issues involved in its memorandum of April 14, 1952, filed in opposition to the aforesaid motion to dismiss (pp. 2 and 3) in which it was stated:

> "That, of course, is not at all what plaintiff asks in its complaint, and Seatrain would be prompt to take exception to a court's exercising any of the functions of the Commission."

In the last mentioned document, Seatrain withdrew some of the prayers for relief that were contained in the original complaint, hoping thereby to avoid any confusion as to the issues actually involved, for even then it appeared that the misstatements of the defendants might precipitate such confusion. Sought in the prayers so withdrawn was injunctive relief from the concerted actions of the defendants in violating various provisions of the Interstate Commerce Act and orders of the Commission for the purpose of forcing Seatrain into further litigation before the Commission and the courts, and by reason thereof to cause such uncer-

tainty as to prevent, hinder and retard Seatrain's growth and expansion, with concomitant limitation of its earning powers.

The Commission is fully aware of these activities of the railroad defendants, for it is now confronted with the necessity of having to deal with the promulgation by the railroad defendants of unlawful embargoes, the publication of unlawful tariff clauses stating that no through routes exist (I. & S. Docket No. 5979, *Routing Restrictions Over Seatrain Lines, Inc.*), the failure and refusal of certain defendants to abide by and with the orders issued in *Borough of Edgewater, N. J.* v. *Arcade & A. R. Corp.*, 280 I. C. C. 121, and with the various sections of the Commission's order, as amended, in *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 7 and 243 I. C. C. 199.

In initially seeking injunctive relief from such conspiracy to violate the law and the Commission's orders, Seatrain did not, as the railroad defendants and the Association allege, request the Federal Court to assume jurisdiction and regulatory authority over any matter over which the Commission has jurisdiction. For the reasons stated to the Federal Court, and to preclude any confusion as to the relief sought, Seatrain withdrew the prayers for injunctive relief, as aforesaid, and thereupon there remained in issue, in the anti-trust proceeding, only the two matters described in the petition for the issuance of declaratory orders, namely, the issue pertaining to damages suffered primarily from abuse of processes and the issue dealing with the use of cars belonging to railroads which do not participate in or maintain through routes with Seatrain.

In addition to these various improper statements, the Commission's attention is directed to similar misstatements made by the railroad defendants in their complaint in Docket No. 31014, dated March 26, 1952. This complaint was filed prior to Seatrain's withdrawal of the above-mentioned prayers for relief and prior to the statement made

by Seatrain (in its memorandum of April 14, 1952, filed with the District Court, as aforesaid) pointing out the misconceptions or errors of the defendants with respect to the issues before the Federal Court. Nevertheless, in the almost eleven months which have transpired since Seatrain amended its complaint by withdrawing those prayers, the complaint in Docket No. 31014 has not been amended to reflect the withdrawal of those prayers for relief. Despite the withdrawal of those prayers, which accordingly limited the issues solely to the question of damages and exclusion from car use, as aforesaid, the railroad defendants currently continue to make the above-quoted misrepresentations both to the Interstate Commerce Commission and to the Supreme Court. Apparently they continue to misstate the case in order to provide support, which otherwise would be totally lacking, for their misrepresentation of the District Court's decision, as shown under the next two sub-headings.

1. *Contrary and Conflicting Arguments Advanced By the Railroad Defendants and the Association Concerning the Jurisdiction of the Federal Court Over the Damages Sought.*

It is upon the misconceptions and misstatements above mentioned that the railroad defendants and the Association now predicate their interpretation of the District Court's decision as to the question of damages which they have advanced to the Commission and to the Supreme Court. At page 8 of the brief of the railroad defendants herein, there appears the following statement:

> "On October 24, 1952, Judge Forman filed a careful opinion holding that the matters complained of were within the primary jurisdiction of the Interstate Commerce Commission or were subsidiary matters incidental to the principal allegations of the complaint and so insufficient to confer jurisdiction upon the court."

Appendix E

In the brief of the Association herein, beginning at page 6, after urging that the Commission refuse to issue the declaratory order sought with respect to damages, there appears the following statement:

> "As it relates to the anti-trust suit, the question was disposed of by the holding of the District Court that this facet of the alleged conspiracy 'must follow the major charge as being *within the jurisdiction of the Commission.*' " (Emphasis supplied)

Further, on page 9 of the same document, the following statement appears:

> "The District Court held that the Commission had *primary and exclusive jurisdiction* over the matters complained of in the antitrust suit, and it remitted Seatrain to such remedy as it might obtain in appropriate proceedings before this tribunal." (Emphasis supplied)

From these quotations it will be seen that the railroad defendants interpret the District Court's decision as holding that the matter of damages is so incidental and insufficient as to confer no jurisdiction upon the Court. The statement of the Association, quoted above, which contains a quotation from the District Court's decision, indicates on the contrary, that the Court settled the matter by holding that the issue with respect to the use of cars is "within the jurisdiction of the Commission" and "that the Commission had primary and exclusive jurisdiction."

As the railroad defendants and the Association thus place different interpretations upon the decision of the District Court, attention is called to the statements of the railroad defendants and the Association in their joint brief, Exhibit A hereof, filed with the Supreme Court. The statements dealing with this matter, which are contained

on pages 8 and 9 of said brief, do not conform with either of the last above quoted statements addressed to the Commission.

The Commission's attention is further directed to the statements of the defendants contained in their brief dated April 1, 1952, filed in the anti-trust proceeding, in support of their motion to dismiss the complaint therein (pages 32 and 33), wherein the defendants assert that the Commission has jurisdiction over abuse of processes before it and thus may award damages in connection therewith, but that the Commission does not have any jurisdiction with respect to abuse of processes before the Federal Courts and therefore has no authority to award reparation for damages in connection therewith.

In view of these contradictory and conflicting statements made by the defendants to the Federal Courts and the Commission, as to the matter of the Commission's authority to award reparation for damages suffered from abuse of processes before it or before the Federal Courts, Seatrain respectfully submits that it is entitled to the issuance of the declaratory order sought from the Commission.

2. *The Railroad Defendants and the Association Erroneously Interpret the Findings of the District Court Regarding the Jurisdiction of the Commission Over Unfair Competitive Practices and the Commission's Power to Award Reparation In Connection Therewith.*

The railroad defendants, in their brief herein as well as in their joint brief with the Association filed with the Supreme Court, misstate the opinion of the District Court. At page 9 of Exhibit A, the following statements appear:

> "We urged, and the court held (R. 618) that these were incidental or subsidiary complaints, in-

sufficient in themselves to warrant a retention of jurisdiction.[10] This holding is correct."

In footnote 10, the following appears:

"What the district court in fact held was that the charges of unfair competition were so clearly dependent upon the main allegations relating to car interchange, etc., that it would not carve up the complaint to separate these minor and incidental allegations in order to create an independent cause of action; these, therefore, followed the major charges."

The District Court decision held, first, that the Commission had jurisdiction over the unlawful competitive trade practices, including abuse of processes before it and the Federal Courts, and, second, that the Commission had the power to award reparation in connection therewith, as shown in the following quotation from the decision of the Court:

"The subsidiary charges made by Seatrain as to unfair competitive practices upon the part of the defendants are incidental to the main allegations of the complaint that the defendants have conspired to deny to Seatrain interchange and use of freight cars owned by railroads. They must follow the major charge as being *within the jurisdiction of the Commission.*

"Neither can this court maintain jurisdiction over the suit in so far as it claims treble damages from the primary defendants under the holding herein that the complaint charges acts cognizable under the primary jurisdiction of the Commission which are *remediable under its reparation power. Keogh*

v. *Chicago & N. W. Ry.*, 260 U. S. 156 (1922); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U. S. 500 (1936); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945)." (P. 30 of Volume 2 of petition of December 10, 1952, for declaratory orders.) (Emphasis supplied)

Seatrain can find no authority vested in the Commission enabling it to assume jurisdiction over alleged abuse of processes before it or the Federal Courts. Neither can Seatrain find authority vested in the Commission to award reparation for damages suffered by reason of the abuse of processes before it or the Federal Courts. For these reasons, Seatrain filed its petition seeking, from the Commission, the issuance of a declaratory order resolving that issue insofar as the Commission is concerned; and, coupled therewith, Seatrain asked the Commission to cite the sections of the Act which give the Commission such authority as the Commission feels it may have as to these matters, so that Seatrain may proceed to file a proper complaint before the Commission to obtain the relief it seeks.

The last-cited quotations from the railroad defendants' brief compel the conclusion that they ascribe to the Court's decision the holding that the various examples offered by Seatrain to illustrate to the Court the abuse of processes prior to and subsequent to November 30, 1951, were all related to the "interchange and use of freight cars owned by railroads".

One of the examples referred to above, submitted to the Court, dealt with the joint action of the railroad defendants in endeavoring to have set aside the Commission's order granting Seatrain temporary authority to operate between New York and Savannah, *Alabama Great Southern R. Co.* v. *United States, supra*. That action was commenced immediately after Seatrain announced that its first sailing, pursuant to such authority, would be

on November 30, 1951. Much publicity was given to the fact that the railroad defendants were seeking court action to stop the first sailing. The final decision of the three-judge statutory court was dated January 9, 1952 (103 F. Supp. 223).

Following the decision, the railroad defendants had until April 10, 1952, to appeal from the decision of the statutory court. Accordingly, uncertainty with respect to the continuance of Seatrain's service remained for thirteen weeks. During this period, Seatrain had great difficulty in persuading shippers and consignees to use its service. By reason of these actions of the railroad defendants, Seatrain suffered substantial losses. Certainly those actions are not prohibited by nor declared to be unlawful in the Interstate Commerce Act, nor can they be deemed to have been "subsidiary" or "incidental" to any question of jurisdiction over cars. An examination of the contentions of the railroad defendants in that proceeding and the reply brief of Seatrain filed in connection therewith clearly demonstrates that the statutory court action (103 F. Supp. 223) was neither instituted nor prosecuted by the defendants in good faith or with probable cause.

Another illustration given to the District Court, of actions taken by railroad defendants in proceedings before the Commission and before the Federal Court, which caused Seatrain grave injury, was in connection with the amendment of the Commission's order in Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co., supra,* pertaining to the publication of joint rates with Seatrain via New York and New Orleans. This case was cited to the Federal Court as an illustration of the abuse of processes. A detailed review of the actions of certain railroad defendants in challenging in the Federal Courts, after the culmination of the Commission's administrative functions, the report and order of the Commission duly and properly made upon an exhaustive record, clearly shows that

their actions were taken in bad faith and without probable cause and, in no way, were related to the extent of the Commission's jurisdiction over the use of cars.

As indicated hereinbefore, at page 8 of the railroad defendants' brief herein, there appears the following statement:

> "On October 24, 1952, Judge Forman filed a careful opinion holding that the matters complained of were within the primary jurisdiction of the Interstate Commerce Commission *or* were subsidiary matters incidental to the principal allegations of the complaint and so insufficient to confer jurisdiction upon the court." (Emphasis supplied)

The gratuitous insertion of the "or", emphasized above, is not only unwarranted but is contrary to the actual decision. Its insertion creates confusion and distortion. It should be disregarded.

(B) The Railroad Defendants and the Association Misconceive and Misstate the Underlying Objective of the Petition for the Issuance of Declaratory Orders.

It is evident that the railroad defendants, in seeking dismissal of the petition for the issuance of declaratory orders herein, misconceive or refuse to recognize the basic objectives of the petition. The petition for the issuance of declaratory orders, as well as this reply brief, clearly and as potently as language permits, stress that Seatrain is not seeking relief in the way of damages from, or orders precluding, alleged improper acts or violations of the law. It merely seeks ascertainment of the tribunal to which, and the sections of the law under which, it might proceed to obtain relief. The railroad defendants' brief is postu-

lated upon the proposition that the petition for the issuance of declaratory orders actually seeks, now and here, the relief that would be sought only after adjudication of the declaratory order petition and the subsequent filing of appropriate proceedings before the proper authorities under determined provisions of law.

At pages 36 and 37 of the railroad defendants' brief, it is stated:

> "The establishment of conditions of car-interchange and the grant of reparation are matters of adjudication which may be determined only after hearing. (Citations) To this extent the questions presented by the petition are fit subjects for consideration under Section 5(d) of the Administrative Procedure Act. The declaratory orders, however, may be issued only after hearing is held."

This petition for the issuance of declaratory orders does not seek the establishment of any "conditions," nor does it seek the "grant of reparation"! If it did, we would agree with the railroad defendants that hearings are necessary. If it did, we would agree that "it raises issues that cannot be determined in the abstract or without regard to the facts" (page 43 of brief). If it did, we would agree that hearings are necessary to make "findings with respect to what is needed to insure the movement of interstate commerce without interruption or delay. These findings obviously depend upon facts" (page 43 of brief). If it did, we would agree that hearings are required so that "full factual data regarding such matters are before the Commission" (page 43 of brief).

If relief were here sought in the way of orders concerning the terms and conditions of car interchange, we would agree that hearings would be necessary, for:

> "The question then is a factual one: what is necessary by way of car interchange to insure that commerce moves without interruption or delay or, if the Court's phrasing be employed: what Commission orders will eliminate the possibility that 'Seatrain cannot function'?" (page 44 of brief)

If the declaratory petition sought specific relief under and pursuant to certain sections of the Act, or if the petition herein sought orders that either required carriers to desist from violations of the law or to comply with certain provisions of the law, *which it definitely does not,* then hearings would clearly be necessary. In view of the nature of the petition and the specific declaratory orders sought thereby, setting forth whether the Commission has jurisdiction and, if so, under what section or sections of the Act, the railroad defendants' discussion relative to hearings prior to the grant of reparation or the establishment of car interchange conditions and the like are all immaterial and irrelevant to the petition herein.

Clearly the railroad defendants and the Association misconceive and misstate the underlying objective of the petition for the issuance of declaratory orders!

III. The Complaint in Docket No. 31014 Continues to Be Used As a Device to Confuse and Abuse Legal Processes. It Should Be Dismissed Forthwith.

(A) The Question Whether the Commission Has Unlimited Jurisdiction Over All Cars Used In Connection With Seatrain's Services Is Not Before the Commission in Docket No. 31014.

The railroad defendants and the Association request the Commission not to issue the declaratory order sought with respect to the matter of the Commission's jurisdiction

to require railroads that do not participate in or maintain through routes with Seatrain to permit their cars to be used in connection with Seatrain because, it is contended, this issue is pending before the Supreme Court. However, it should be observed that, while concurrently so urging the Commission not to act pursuant to the petition for declaratory orders, the railroad defendants and the Association are requesting the Supreme Court not to pass on this question because it is before the Commission. At pages 5 and 6 of Exhibit A, the following statement appears:

> "The basic question [jurisdiction over cars] which the petitioner now asks this Court to consider is, therefore, together with others, now at issue before the Interstate Commerce Commssion."

Evidently the contention that the matter of the Commission's jurisdiction over cars is now at issue before the Commission has reference to the complaint filed by railroad defendants with the Commission in Docket No. 31014, which is referred to at page 8 of Exhibit A as follows:

> "Nor, indeed, is any reason given why petitioner should rush to this Court prior to the Commission's own re-examination of the issue; that re-examination is involved in respondent railroads' complaint filed with the Commission in March, 1952, * * *."

These quoted statements made to the Supreme Court are not in accordance with the facts. The attention of the Commission is called thereto because this constitutes the latest attempt of the railroad defendants to mislead a Federal court with respect to matters pending before the Interstate Commerce Commission.

The railroad defendants and the Association have made no attempt to disprove or deny the statements, contained

in Seatrain's petition for the issuance of declaratory orders, that the complaint in Docket No. 31014 is not based upon the possession by the Commission of that unlimited jurisdiction over the use of cars which the railroad defendants and the Association asserted to the District Court. Rather, the complaint is based upon the limited jurisdiction which the Commission found it had in Docket No. 25565, *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328; Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co., supra,* and Docket No. 25728, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.*, 248 I. C. C. 109. Furthermore, the petition for the issuance of declaratory orders stressed the fact that the Association was neither a complainant nor a defendant in the complaint, Docket No. 31014, as it would have to be if there were involved therein any issue relating to jurisdiction by the Commission over cars of railroads which do not participate in or maintain through routes with Seatrain.

The railroad defendants, which are the complainants in Docket No. 31014, are railroads which have been, since 1932, and are now, parties to through routes with Seatrain in all of its services. Merely because some of the railroad defendants deny this fact does not alter it. In any event, the railroad defendants not only have asked the Commission to establish through routes with Seatrain but on page 8 of Exhibit A the following statement appears:

> "All of the railroads named as defendants in that proceeding [anti-trust case] and against which relief is sought are railroads that are admittedly in a position to be parties to through routes with Seatrain."

Since the decision of the Supreme Court in *United States* v. *Pennsylvania R. Co.*, 323 U. S. 612, the railroad defendants and the Association have repeatedly recognized

the authority of the Commission to require railroads which participate in or maintain through routes with Seatrain to permit their cars to be used in connection with Seatrain service. Exhibit 40* in the anti-trust proceeding graphically illustrates the territory in which are located the railroads over which the Commission has jurisdiction with respect to the use of their cars in Seatrain's New York-Savannah service. All of the railroad defendants are included therein. Neither Seatrain, the railroad defendants, nor the Association in any proceeding heretofore, since the Supreme Court affirmed the Commission's decision in Docket No. 25728, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.*, supra, has challenged or questioned the Commission's authority to require railroads which participate in or maintain through routes with Seatrain to permit their cars to be so used. The railroad defendants and the Association, as shown in the quotation above from their joint brief (Exhibit A), appear not to challenge such authority. However, the railroad defendants in their brief herein now assert a brand new interpretation of the extent of the jurisdiction of the Commission.

The question here before the Commission is whether or not the Commission has authority over cars of railroads which do not participate in or maintain through routes with Seatrain. Such railroads are those whose cars are not subject to the jurisdiction of the Commission under its decisions in Docket No. 25565, *Investigation of Seatrain Lines, Inc.*, supra, Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*, supra, and Docket No. 25728, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co.*, supra, whereas the cars of the railroad defendants are subject to the Commission's jurisdiction, as heretofore shown and admitted. The complaint in Docket No. 31014 is confined

* Exhibit 40 annexed to the affidavit submitted by Seatrain in support of its Application for Preliminary Injunction.

to cars of railroad defendants and other railroads which have, or may be required to establish, through routes with Seatrain. As a matter of fact, the prayers for relief in the aforesaid complaint, insofar as cars are concerned, are definitely and unequivocally limited and restricted to the use of cars of railroads that participate in or maintain through routes with Seatrain. Specifically, Prayers 4 and 6 of the complaint, which are the only prayers relating to the use of cars, are limited in that manner. Those prayers read as follows:

> "(4) Requiring Seatrain to provide reasonable facilities for operating such through routes as may be in existence or prescribed, now or hereafter, including an equitable portion of the cars attributable and appropriate to its use, or in the alternative, requiring Seatrain to pay a per diem rate which shall fully reflect its peculiar and unusual character and type of car use;"
>
> "(6) Fixing reasonable terms and conditions under which such through routes shall be operated and all terms and conditions of car use to be observed by Seatrain, including the compensation to be paid by Seatrain for its use of railroad cars, and the manner and method of payment;"

The complaint seeks establishment of through routes by the Commission and recognizes the Commission's authority to require the use of cars of all railroads participating therein. Nowhere in said complaint, Docket No. 31014, is any issue raised with respect to the use of cars by railroads that do not participate in or maintain through routes with Seatrain and whose cars are therefore not subject to the jurisdiction of the Commission as defined in Docket No. 25565, *Investigation of Seatrain Lines, Inc.*, supra, Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.*,

supra, and Docket No. 25728, *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co., supra.* The railroad defendants and the Association now are thus misrepresenting to the Supreme Court of the United States the nature and contents of said complaint. The prayers in said complaint do not raise any issue with respect to the jurisdiction of the Commission over cars of railroads which do not maintain or participate in through routes with Seatrain.

(B) There Is No Issue Herein Involving the Terms and Conditions in Connection with the Use of Cars in Seatrain's Services.

The railroad defendants and the Association failed to make clear to the Supreme Court that the railroad defendants, for the nineteenth and twentieth times, by their briefs to the Supreme Court and the Commission herein, are raising the issue and are challenging the Commission's decision with respect to the terms and conditions pertaining to the use of their cars in connection with Seatrain. There is no issue as to terms and conditions with respect to the use of cars now before the Commission in this proceeding. As to this matter, on page 4 of Exhibit A there appears this statement:

> "From the previous litigation there has not emerged a definitive solution of the controversy."

As was pointed out in the petition for the issuance of declaratory orders, the railroad defendants by their complaint, Docket No. 31014, are again attempting to have the Commission reverse its findings, which were affirmed by the Supreme Court, with respect to the terms and conditions in connection with the use of cars. Seatrain is seeking relief from such continuous attacks upon orders of the Commission. It does not subscribe to the theory that decisions of the Commission, rendered after years of the most

exhaustive litigation, which have been upheld by the Supreme Court and which have been accepted by practically every railroad in the country except the railroad defendants, are subject to repeated reviews by the Commission and the Supreme Court. Having found no means of stopping the railroad defendants and the Association from repeatedly challenging the decisions of the Commission and the Supreme Court in this respect, while violating Commission orders in many other respects, and thus keeping Seatrain in constant litigation and uncertainty, Seatrain brought the anti-trust proceeding hoping to find relief from these tactics and the repeated misrepresentations made to the Commission and the Federal Courts by the railroad defendants and the Association.

(C) There Is No Issue Herein Concerning the Status of Seatrain as a Water Carrier Subject to Part III of the Act, and Efforts to Inject Such Issue are Improper and Meaningless.

The Commission's attention is directed to still another attempt by the railroad defendants and the Association to confuse and distort matters pertaining to the use of cars in Seatrain's service. At page 4 of Exhibit A, the railroad defendants and the Association make the following statement to the Supreme Court:

> "The basic question running through all these proceedings is whether the Commission should deal with Seatrain as though it were a break-bulk water carrier or as though it were a rail carrier. It is in fact neither, but instead a rail carrier by water."

In its petition for the issuance of declaratory orders (Volume 1, pp. 25-26) Seatrain listed eight proceedings in which the railroads have challenged the status of Seatrain as a carrier. Seatrain did this to show the number of instances in which the Commission and

the Supreme Court were called upon to affirm that Seatrain is a common carrier by water subject to Part III of the Interstate Commerce Act. Once more the railroad defendants and the Association are advising the Supreme Court that they are seeking again to induce the Commission to ignore or reverse its previous decisions and those of the Supreme Court. Nowhere in the Interstate Commerce Act is there any provision for regulating "rail carriers by water." Obviously the Commission will not attempt to regulate Seatrain except in accordance with the provisions of the Interstate Commerce Act and, in so doing, it will zealously guard against being persuaded, again, by the railroad defendants from doing otherwise.

The Supreme Court, once before, had been called upon to decide this fundamental question. In *Seatrain Lines, Inc., Common Carrier Applications,* 260 I. C. C. 430, the railroad defendants, other than the Erie Railroad and the Baltimore and Ohio Railroad, requested the Commission to cancel Seatrain's certificate of public convenience and necessity and issue a new one severely limiting its operating authority. In the oral argument before the Commission (as shown at page 395 of the Transcript of Record filed in the Supreme Court of the United States, October Term, 1946, No. 61, *United States* v. *Seatrain Lines,* 67 S. Ct. 435), there appears the following statement made by counsel for the railroad defendants:

> "I would like to discuss primarily on behalf of these railroads the point that Seatrain service is so unique and so different from that of other water carriers as not to warrant a certificate of the scope previously issued."

Seatrain's original certificate was issued to it as a common carrier, by water, of commodities generally and authorized operations between the Ports of New York, New Orleans and Texas City. The original certificate was can-

celed by the Commission and a new certificate, conforming with the views of railroad defendants that Seatrain should be a "rail carrier by water", was issued. As the result of the unanimous decision of the Supreme Court, *United States* v. *Seatrain Lines, supra,* Seatrain's original certificate was restored to it.

In the anti-trust proceeding, Seatrain is seeking relief from the constant attack, by railroad defendants, against its status as a water carrier subject to Part III of the Interstate Commerce Act.

(D) Positions Taken by Railroad Defendants and the Association Over the Years, Before Various Tribunals, As To the Jurisdiction of the Commission Over Cars For Use In Connection With Seatrain, Have Been Inconsistent, Conflicting and Contradictory.

In its petition for the issuance of declaratory orders, Seatrain pointed out that the railroad defendants and the Association, for years, had contended that the Commission lacked authority to require the cars of any railroad to be used in connection with Seatrain service. Upon appeal from the Commission's decision in *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co., supra,* the railroad defendants (the Erie Railroad and the Baltimore and Ohio Railroad excepted) continued to maintain the position that the Commission lacked jurisdiction over any cars for use in connection with Seatrain. Since the decision of the Supreme Court, *United States* v. *Pennsylvania R. Co., supra,* the railroad defendants and the Association, except as heretofore indicated, have maintained the position that the Commission's jurisdiction over cars was limited, as found by the Commission, to cars belonging to railroads which participated in or maintained through routes with Seatrain.

In the anti-trust proceeding, however, the railroad defendants and the Association asserted that the Commis-

sion's jurisdiction with respect to the use of railroad cars in connection with Seatrain was unlimited. Seatrain pointed out that nowhere, theretofore, had any such admission been made and questioned whether the railroad defendants and the Association would maintain in any proceeding before the Commission the position which they had so taken before the Federal Court. That uncertainty was one of the reasons asserted by Seatrain for seeking a declaratory order with respect to the jurisdiction of the Commission. That Seatrain was justified in seeking that declaratory order is now established by the briefs filed by the railroad defendants and the Association herein.

The Association, in its brief herein, adheres to the position which it took before the Federal Court, that the Commission's authority is unlimited. The railroad defendants, however, in urging that the Commission do not issue the declaratory orders, whittle down and retract from the position taken before the Federal Court and eventually conclude that *the extent of the Commission's jurisdiction* is not defined by any provision of the Act but depends upon a detailed inquiry as to:

> " * * * Seatrain's need, the car supply now available to it, the degree to which Car Service Rule 4 interferes with its operations, etc." (P. 45 of brief)

On page 46 of the same brief, the following statement appears:

> "Here again a fair answer to the question of *the exact dimensions of the Commission's jurisdiction* can be made only after full hearing and not in response to abstract questions." (Emphasis supplied)

Those statements are wholly at variance with those made to the Federal Court. Any provision of the Interstate Commerce Act that sought to define the Commission's jurisdiction in such a vacillating manner would be directly

contrary to the provisions of the National Transportation Policy. No water carrier, such as Seatrain, could long stay in existence if the Commission's jurisdiction changed from time to time, varied with respect to each of its services, and was dependent upon such other factors as those enumerated by railroad defendants. There being no provision in the Act so defining the Commission's jurisdiction, it is neither proper nor lawful to so interpret existing law, because of the provisions of the National Transportation Policy which the Supreme Court interpreted in *United States* v. *Pennsylvania R. Co., supra,* as follows:

> "The interrelationship of the three parts of the Act was made manifest by its declaration of a 'national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each.' " (323 U. S. 612, 616)
>
> • • •
>
> "This policy cannot be carried out as to Seatrain's interstate carriage unless railroads interchange their cars with it. The particular type of service introduced by Seatrain, and found by the Commission to be qualitatively superior, cannot be rendered without the privilege of carrying the very railroad cars which carry freight to its ports. The 'inherent advantages of this service' would be lost to the public without railroad car interchange." (323 U. S. 612, 617)

(E) The Assertion That There Are Long-Standing and Unsettled Disputes Between Seatrain "and the Railroads", Is Wholly Without Foundation.

The railroad defendants, in their brief herein, urge the Commission not to issue the declaratory orders sought but

to proceed, at some unnamed and wholly undeterminable date, with hearings in connection with the complaint in Docket No. 31014. They allege that Seatrain then would have an opportunity, by cross-complaint, to inject the questions which it raises in its petition for the issuance of declaratory orders. As Seatrain has dealt with this particular subject at length in its petition and has filed a complete answer in Docket No. 31014, and as neither the railroad defendants nor the Association has taken any action to dispute or deny the contentions made by Seatrain with respect to said complaint, the Commission is urged to dismiss that complaint forthwith, not only for the various reasons heretofore given but also to prevent the railroad defendants and the Association from continuing to misrepresent to the Federal Courts the purposes and contents of said complaint.

Seatrain also pointed out at length that the complaint was so drawn as to make it appear that various matters were in issue between Seatrain "and the railroads" of the United States, whereas, in fact, the issues raised with respect to Seatrain's Gulf services are confined to disputes between Seatrain and The Pennsylvania Railroad Company alone. As to Seatrain's Savannah service, the dispute, as indicated, is primarily between Seatrain, on the one hand, and The Pennsylvania Railroad Company, Atlantic Coast Line Railroad Company, Seaboard Air Line Railroad Company, and Southern Railway Company, on the other, because other New England, Eastern and Southern railroads were and are cooperating, to a large extent, with Seatrain in connection with the operation of that service, having recognized the existence of through routes, having permitted their cars to be used, having issued through bills of lading, and otherwise having done business in a normal, lawful fashion. It was pointed out that numerous railroads were considering the publication of joint rail-and-water rates with Seatrain in that service, and, since the filing of the petition herein, the following railroads have

published such joint rates with Seatrain and have agreed upon the divisions thereof with Seatrain:

Boston and Albany Railroad
Boston and Maine Railroad
The Delaware and Hudson Railroad Corporation
Erie Railroad Company
The Lehigh and Hudson River Railway Company
Lehigh and New England Railroad Company
Maine Central Railroad Company
The New York Central Railroad Company
The New York, New Haven and Hartford Railroad Company
New York, Susquehanna and Western Railroad Company

While all of these facts are known to the railroad defendants and the Association, nevertheless in their brief, Exhibit A, they stress to the Supreme Court that the disputes are between the railroads of the United States and Seatrain. On page 5 thereof, the following statement appears:

> "The respondent railroads believed that the controversy between Seatrain and *the railroads* should receive a definitive and speedy determination by the agency vested with statutory authority to determine the basic issues involved. They, accordingly, filed, on March 26, 1952, a complaint with the Interstate Commerce Commission asking for a comprehensive examination and decision of the many issues between Seatrain and *the railroads.*" (Emphasis supplied)

Similar misrepresentations were made to the District Court for the District of New Jersey which, no doubt, led Judge FORMAN to the conclusion that said complaint, in Docket No. 31014, would serve as a means of settling the long-standing controversies between Seatrain "and the railroads".

(F) Enforced Compliance with the Commission's Outstanding Orders Will Result In Automatic Disposition of Basic Prayers For Relief In Docket No. 31014.

In view of the continued misrepresentation by the railroad defendants and the Association with respect to the complaint, Docket No. 31014, and in particular with respect to all of the issues raised therein concerning Seatrain's Gulf services, which in fact are not in dispute between any railroad and Seatrain, except The Pennsylvania Railroad Company, Seatrain urges the Commission to pursue the most vigorous action in the enforcement of its orders in *Borough of Edgewater, N. J.* v. *Arcade & A. R. Corp., supra,* and Docket 25727, *Seatrain Lines, Inc.* v. *Akron C. & Y. Ry. Co., supra,* and in particular calls the Commission's attention to the fourth ordering paragraph of its order in Docket No. 25727, *Seatrain Lines, Inc.* v. *Akron, C. & Y. Ry. Co.,* which reads as follows:

> "It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before May 1, 1941, from the unlawful discrimination between complainant, on the one hand, and the Southern Pacific Company (Southern Pacific Steamship Lines, Morgan Line) and the Pan-Atlantic Steamship Corporation, on the other hand, which has been found to exist with respect to ocean-rail rates, and thereafter to maintain ocean-rail rates between points referred to in the next preceding paragraph in connection with complainant which shall not exceed concurrent rates between the same points in connection with the Southern Pacific Company (Southern Pacific Steamship Lines, Morgan Line) and the Pan-Atlantic Steamship Corporation via New York, N. Y., and New Orleans, La., on corresponding traffic similarly packed and prepared for shipment."

Appendix E

The Pennsylvania Railroad Company is the only railroad which has not established joint rates in connection with Seatrain's Gulf services. Since March 12, 1947, when Seatrain restored coastwise operations following World War II, The Pennsylvania Railroad Company has consistently failed and refused to establish joint rates with Seatrain while contemporaneously maintaining joint rates with the Pan-Atlantic Steamship Corporation between New York and New Orleans. Enforcement of the aforesaid orders will cause most of the issues in the complaint, Docket No. 31014, to become moot and will eliminate a substantial part of the existing controversy. The Pennsylvania Railroad Company, in effect, by the complaint in Docket No. 31014, requests the Commission to desist from enforcing its orders directing the railroad defendants therein, including The Pennsylvania Railroad Company, to establish joint rates (ocean-rail rates) with Seatrain, pending the issuance of new orders to establish the joint rates sought by the complaint in Docket No. 31014.

It is respectfully submitted that the complaint in Docket No. 31014 is a request upon the Commission to make a farce of regulation. If the present orders of the Commission are not to be obeyed, there is no need for the issuance of further orders. We are confident, therefore, that for this, as well as for other reasons heretofore cited, the Commission will dismiss the complaint in Docket No. 31014 but, in view of the misrepresentations with respect thereto, which are being made to the Supreme Court, as shown in Exhibit A, Seatrain prays that the Commission dismiss the complaint forthwith. A copy of Seatrain's answer to the joint brief of railroad defendants and the Association filed with the Supreme Court (Exhibit A) is attached hereto as Exhibit B.

Were the Commission's outstanding orders to be enforced, immediately there would result automatic disposition of the basic prayers for relief in Docket No. 31014. Com-

pliance with those orders would afford a complete answer to those basic prayers for relief and render them meaningless.

IV. Procedural Matters With Respect to Section 5(d) of the Administrative Procedure Act.

(A) The Declaratory Orders Here Sought Would Determine In Full the Controversy Involved.

The declaratory orders herein are sought to terminate a controversy and to remove uncertainty relative to the jurisdiction of the Interstate Commerce Commission to act, and the specific provisions of the law enabling the Commission to so act, as to the two queries set forth in the petition for declaratory orders. The confusion and uncertainty that exist and that are sought to be resolved by the instant petition exist wholly and solely before the Interstate Commerce Commission and with respect to its jurisdiction. Determination of those queries will remove the controversy and uncertainty insofar as they exist before the Interstate Commerce Commission.

It is true that determination of the petition for declaratory orders will not determine all issues in other and unrelated cases, nor will it terminate all other cases, but it will determine and thus terminate, with finality, the controversy and uncertainty that exist before the Interstate Commerce Commission, to the extent of the Commission's ability to finally determine any matter before it, as to its jurisdiction and the section or sections of the Act under which relief may be sought.

The railroad defendants ask that the Commission not act in connection herewith because "declaratory orders issued at this time would be subject to judicial review" (p. 34 of brief). All declaratory orders are subject to judicial review, as are most orders of the Interstate Com-

merce Commission. Does that constitute a valid reason for refusing to act? If so, the provisions of Section 5(d) of the Administrative Procedure Act and many, if not most, of the other sections of the law would become meaningless. To the extent that decisions of this Commission are reviewable by the Courts, the Commission cannot finally settle issues by its decisions. It can, however, by decision and order, cause matters before it to be brought to a stage of Interstate Commerce Commission finality. That is what the petition for declaratory orders here seeks.

It is alleged that the petition for declaratory orders should be dismissed because the orders sought would not settle the actual controversy in the anti-trust case (pp. 28 and 34 of brief). Obviously, that is true. The principal relief sought in the anti-trust case is in connection with conspiratorial "unfair competitive practices" for which substantial monetary damages are sought. As to that matter, the railroad defendants affirmatively admit that the Commission does not possess the necessary jurisdiction (p. 41 of brief):

> "If Seatrain were seeking damages based solely upon allegations of harassing and unfair litigation, unrelated to any alleged ends of depriving it by such harassment of rights under the Act, whether by concerted or individual action, then certainly there is no authority in the Commission to order reparation."

The brief of the Association makes no such admission. However, it states nothing to the contrary.

If the Commission should find that it has no jurisdiction over the "unfair competitive practices" alleged, which are violations of other than specific sections of the Act, clearly it could not determine the controversy, existent in the anti-trust case, of whether damages should be issued and the amount thereof. However, the Commission's de-

termination by declaratory orders herein certainly would terminate the controversy and remove the uncertainty of its jurisdiction and the ability of a litigant to petition the Commission for relief relative thereto.

Again, it is stated that a declaratory order of the Commission will not settle the controversy involved in Docket No. 31014 (pp. 28, 29 and 34 of brief). That statement clearly is true. Docket No. 31014 precipitates many, many issues that in no wise involve or affect the petition for the declaratory orders sought. Docket No. 31014 in no way relates to or involves damages resulting from "unfair competitive practices" and violations of other than specific sections of the Act. Declaratory orders relative to the Commission's jurisdiction and the sections of the law that confer jurisdiction upon the Commission relative to "unfair competitive practices" obviously could neither settle nor determine the unrelated issues involved in Docket No. 31014. To the extent that the petition seeks declaratory orders relative to the Commission's jurisdiction, and the sections of the Act conferring such jurisdiction, to require railroads which do not participate in or maintain through routes with Seatrain to permit interchange of their freight cars with Seatrain, it clearly could not adjudicate Docket No. 31014.

From the foregoing it is apparent that the declaratory orders herein, although subject to judicial review and although not capable of determining all controversies existing in other and unrelated proceedings, unequivocally will terminate a controversy and remove uncertainty in full before this Commission relative to the jurisdiction of the Commission, the sections of the Act conferring that jurisdiction, and the sections of the Act which, when properly alleged to be violated, would constitute the basis for the filing of valid complaints.

(B) The Declaratory Orders Here Sought Are Not Part of a Controversy; their Issuance Is Necessary and Vital for Proper Legal Procedure.

At page 5 of the railroad defendants' brief it is stated:

> " * * *, the petition is unnecessary because other proceedings are already pending before the Commission in which those questions can more properly be decided."

Nowhere in the brief do the railroad defendants indicate in what other proceedings the precise queries herein advanced are pending and may or will be determined. The only other proceeding pending before the Commission, to which reference is made in the brief, is Docket No. 31014. It has already been established that the queries involved in the petition herein are in no wise involved in that proceeding. It has been shown that determination of the issues in Docket No. 31014 can neither answer nor affect the queries propounded in the instant petition.

At page 9 of the brief, the railroad defendants state:

> "There is now pending before the Commission a broad-based complaint seeking definitive adjudication of the long standing and extensive controversies existing between Seatrain and the railroads. That complaint raises the car service issue and asserts the Commission's jurisdiction to settle that issue in broadest terms."

As has been reiterated hereinbefore, the complaint in Docket No. 31014 deals with the use of cars as facilities to be supplied only by railroads which participate in and maintain through routes with Seatrain. The petition for declaratory orders, on the other hand, relates to the use of cars only in connection with railroads which do not participate in or maintain through routes with Seatrain. Clearly, the railroad defendants' assertion that settlement

of this issue is sought "in broadest terms" is inconsistent with the complaint itself.

It is most difficult to understand the railroad defendants' conception of proper legal procedure when they state at page 28 of their brief as follows:

> "The abuse of process issue, though mentioned in the Answer, is not before the Commission, Seatrain having sought no relief from the Commission on that account as it might have done by cross complaint."

Can it be that the railroad defendants are seriously asserting that litigants should institute and process cases before a tribunal that is wholly devoid of jurisdiction? Do they seriously assert that Seatrain should have filed, or should now file, a cross complaint as to a matter that the railroad defendants affirmatively admit is beyond and without the scope of the Commission's jurisdiction? At page 41 of their brief, the railroad defendants affirmatively admit that:

> "If Seatrain were seeking damages based solely upon allegations of harassing and unfair litigation, unrelated to any alleged ends of depriving it by such harassment of rights under the Act, whether by concerted or individual action, then certainly there is no authority in the Commission to order reparation."

If the Commission has no jurisdiction to order reparation, which is another way of stating that the Commission has no jurisdiction over the subject matter hereof, what would be gained by filing a cross complaint before the Commission, dealing with that matter? Similarly, what would be gained by filing a separate complaint with the Commission seeking that relief until and unless the controversy and uncertainty as to the Commission's jurisdiction and the specific sections of the Act under which that jurisdiction is

obtained are determined? To merely raise these questions is to point up the validity and necessity for the issuance of the declaratory orders sought.

The railroad defendants urge that the Commission hold hearings before issuing declaratory orders because after hearings "the Commission here too may find that the conduct of the railroads has been justified and proper and consequently have no need to reach any nice measurements of the extent of its jurisdiction" (p. 41 of brief). Similarly, it is stated "examination of the facts regarding car interchange may well indicate that Seatrain has not been hurt and for that reason alone the time is not yet at hand for a Commission decision that its authority extends further than the point reached in earlier proceedings" (p. 40 of brief).

Here, again, the railroad defendants pose a proposition that is clearly contrary to law. The position of the railroad defendants here appears to be that the matter of jurisdiction is secondary to the merits of the case; that the judicial or quasi-judicial body, devoid of jurisdiction, may usurp jurisdiction for the purpose of determining whether there be merit to the cause before it. Carrying this proposition to its logical conclusion would mean that if the Court found there was no merit in the cause it would dismiss it even though it lacked jurisdiction. Contrariwise, if after full and complete hearing, if the Court found merit in the cause before it, then presumably it would retroactively consider the matter of jurisdiction and only at that time would it dismiss the cause for lack of jurisdiction. Fortunately for litigants, that is not the law.

> "Since lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention; and, if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed." *United States* v. *Griffin*, 303 U. S. 226, 229.

> "Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell* v. *Maurer,* 293 U. S. 237, 244.

The railroad defendants do not indicate under what authority or law the Commission could assume jurisdiction over matters in connection with which it has no statutory authority to act. The railroad defendants do not indicate how the Commission may receive evidence relating to the merits of matters brought before it in connection with other than specific violations of provisions of the Interstate Commerce Act. The failure and refusal of the railroad defendants to so indicate is easily explained. The Commission has neither authority nor power so to do.

(C) The Petition for Declaratory Orders Herein is Properly Filed Under Section 5(d) of the Administrative Procedure Act, and the Commission should affirmatively Act Upon the Petition.

In *Atlantic Frt. Lines, Inc — Petition For Declaratory Order,* 51 M. C. C. 175, because the certificate which was the subject matter of the interpretation sought was issued pursuant to Section 206(a), and since a proceeding under that section is not one which is required by statute to be determined on the record after opportunity for agency hearing, the Commission held that the provisions of Section 5(d) of the Administrative Procedure Act were not applicable. That situation is not existent here. However, it is significant to note that, while finding that the petition was not one properly subject to the provisions of Section 5(d) of the Administrative Procedure Act, the Commission nevertheless undertook to afford the interpretative relief sought. Furthermore, it is significant to observe that the

Commission undertook this activity notwithstanding that an interpretation directly contrary to that of the Commission had been made by the Pennsylvania Superior Court and a writ of certiorari had been denied by the United States Supreme Court. The Commission held, and properly so, that it was the body charged with the administration of the Interstate Commerce Act and thus it is the Commission's duty to clarify matters under its jurisdiction. (That determination should be compared with the request to clarify the jurisdiction of and procedure before the Interstate Commerce Commission sought here.)

The Commission specifically found in *Atlantic Frt. Line, Inc. — Petition For Declaratory Order, supra*:

> " * * *, it may be observed that we do not construe the superior court's decision as intending that its interpretation shall constitute a final and binding adjudication of the matter or as denying to us this subsequent right to interpret our own order even though our interpretation be contrary to its own. Examination of the decision, quoted in part earlier herein, discloses that the court considered that primary jurisdiction to determine the bona fides of interstate transportation is vested in this Commission; and was of the further opinion that when we have determined the matter and have authorized transportation of the character involved herein, our order designating such transportation as interstate commerce is binding on the State and cannot be questioned collaterally. The fact that the court, for reasons heretofore shown, felt justified in interpreting our order collaterally does not preclude us from entertaining, and affording, the relief sought in the instant petition, for it cannot be disputed that it is the province of this Commission to interpret its own orders, and that its interpretations cannot be ignored by the courts unless clearly erroneous or

arbitrary. *Adirondack Transit Lines, Inc.* v. *United States,* 59 Fed. Supp. 503 (affirmed 324 U. S. 824). Nor does the fact that the Supreme Court has denied certiorari alter our jurisdiction in the matter, for that Court itself has repeatedly said that denial of certiorari imports no expression of opinion on the merits of controversy. *Sunal* v. *Large,* 332 U. S. 174, 181; *House* v. *Mayo,* 324 U. S. 42, 48, and cases therein cited." (51 M. C. C. 175, 186)

The railroad defendants are adopting an unnatural and unusual attitude here. They are urging the Interstate Commerce Commission not to act because of their contention that the precise issues herein involved are before the Supreme Court. Concurrently they urge the Supreme Court not to act on the same contention that the precise issues before the Supreme Court are before the Interstate Commerce Commission. They urgently request and pray that Seatrain be afforded no relief and that Seatrain be kept in a quandary as to the nature of the Commission's jurisdiction and the provisions of law under which Seatrain can and should proceed to obtain its relief. Obviously the attitude of the railroads herein is not one of seeking to aid in the administration of evenhanded justice but rather to frustrate and prevent the administration of that justice. The railroad defendants are seeking, through unwarranted and unjustified technicalities and attempted improper utilization of the Commission's own procedures, to prevent a carrier, that in good faith seeks to abide with and by the findings and orders of this Commission and the Court, from seeking the relief which it is clearly entitled to obtain.

There is no justifiable reason for the administrative body to refuse to enable a carrier subject to its jurisdiction to seek through legal and lawful methods and means the right to offer and make available to the public the

inherent advantages of its "qualitatively superior"* service, to provide adequate, economical and efficient service and otherwise to foster sound economic conditions in its transportation, particularly when the end thereof is the development of a national transportation system by water meeting the needs of the commerce of the United States and the national defense. Prompt affirmative action on the petition for declaratory orders will enable Seatrain to properly proceed to do those things. In the light thereof, the Commission clearly and definitely should find that the petition is properly filed and the Commission should affirmatively act in connection therewith without delay.

V. Based Upon the Petition, the Briefs and the Reply Brief Filed Herein, the Commission Should Issue the Declaratory Orders Sought.

(A) The National Transportation Policy Requires Prompt Affirmative Treatment Of the Petition For Declaratory Orders.

Since the original complaint was filed in *Hoboken Mfrs. R. Co.* v. *Abilene & S. Ry. Co., supra,* on December 30, 1932, Seatrain has been striving to obtain relief from the limitations and conditions imposed upon its ability to operate due to restrictions placed against the use of railroad cars in its service. The chronology of that proceeding (Exhibit I, pp. 132-139, Volume 2 of Petition for Issuance of Declaratory Orders) readily shows the great extremes to which the railroads, defendants therein, utilized the Commission's procedures to protract and delay the ultimate conclusion of that proceeding. The railroads, by their brief herein, indicate that their desire and objective would be to cause another twenty years of litigation before Seatrain could obtain even the simplest relief. Experience has shown that assigning even simple Seatrain issues for hear-

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* *U. S.* v. *Pennsylvania R. Co.,* 323 U. S. 612.

ing results in prolonged and protracted litigation. The Commission should not countenance such activity here.

Through the various phases of the litigation antedating and precipitating the instant petition, the Courts, the Association and the railroads have pointed to, emphasized and relied upon the National Transportation Policy, both as to its actual terminology and as to its spirit. The Commission, itself, repeatedly has stressed its deep concern with the delay in rehabilitation of the domestic ocean-going trades, both coastwise and intercoastal. It has shown itself to be concerned with the formulation of appropriate policies for the fostering of sound economic conditions in this vital form of transportation.

Obviously, Seatrain is vitally interested in the rehabilitation of the coastwise trade, as evidenced by its own actions in instituting and maintaining coastwise services. It, too, is deeply concerned with the formulation of appropriate policies for the fostering of sound conditions in coastwise transportation. In consonance therewith, it urges that administration of the Interstate Commerce Act, in recognition of the basic tenets of the National Transportation Policy, can be accomplished only if there be prompt adjudication of the issues involved in this proceeding.

Were the Commission to require and obtain compliance with its orders presently outstanding in connection with Seatrain matters, as hereinbefore indicated, the complaint in Docket No. 31014 would become moot. Many, if not all, of the basic controversies alleged to exist between Seatrain and "the railroads" would be found to be solved. The future possibilities for continued "unfair competitive practices" by certain railroads would be greatly diminished, if not eliminated, and unnecessarily prolonged and protracted litigation would become a thing of the past.

Fulfillment of the objectives of the National Transportation Policy, as well as the future rehabilitation of domes-

tic water-carrier transportation, is irrevocably and inexorably entwined with the obtainment, by the Commission, of compliance with its outstanding orders. The failure and refusal of certain carriers to comply with those orders should not be permitted to be used as the basis for pleadings such as the complaint filed in Docket No. 31014 and, in turn, as the basis for requesting denial and refusal of pleas for fundamental equity and justice such as would be made available by affirmative action on this petition for declaratory orders.

(B) Seatrain, After Having Been Exposed To Time-Consuming Procedures In Airing Its Problems Administratively, Should Not Be Required To Again Become Involved In Prolonged and Protracted Proceedings, Unless It First Determine the Jurisdiction Of the Administrative Agency and the Appropriate Sections Of the Act Under Which To Proceed.

In all of its activities before the Interstate Commerce Commission, Seatrain constantly was confronted with the unequivocal original position of the railroads, that the Commission possessed neither authority nor jurisdiction over car interchange between railroads and Seatrain. Subsequently, Seatrain was faced with the unwavering contentions of the railroads that such authority as the Commission did possess with respect to car interchange was limited and restricted to cars owned by railroads which participated in or maintained through routes with Seatrain.

After the issuance of unambiguous findings and orders by this Commission relative to its lack of complete jurisdiction over use of railroad cars in Seatrain services, Seatrain proceeded with its anti-trust action. There, to its amazement, it was confronted by railroads, who had previously contended to the Commission that the Commission

either had no jurisdiction whatsoever or possessed only limited jurisdiction, now asserting to the Court that the Commission has, and always has had, unlimited and unconditional authority and jurisdiction over the matter. The Association of American Railroads, in its brief filed with the Court in the anti-trust case, asserted that "It would be difficult to imagine more complete jurisdiction over the matter of car service than is thus vested in the Interstate Commerce Commission."

The Court,* in referring to the complaint of Seatrain, properly stated that it alleged:

> "The purpose and effect of said Rule 4, as administered by the Association at the instance of the defendants, is and has been to deny to Seatrain the free use and interchange of cars.
>
> Seatrain has been made the victim of a boycott with regard to the use of cars belonging to the primary defendants and such other parties as they from time to time could induce to deny such use to Seatrain. The Association has acted for all members of the conspiracy in furthering the boycott by imposing and encouraging embargoes against Seatrain and other activities." (P. 10 of Volume 2 of petition of December 10, 1952, for declaratory orders.)
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> "As a direct result of the conspiracy Seatrain has been drawn into numerous lengthy proceedings before the Interstate Commerce Commission and the courts ever since its commencement of the operation of coastwise routes in competition with the railroads in 1932. The litigation has been fomented and main-

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* United States District Court for the District of New Jersey, C. 1188/51, *Seatrain Lines, Inc.* v. *Pennsylvania Railroad Company, et al.*, decision reproduced as Exhibit A of Volume 2 of petition of December 10, 1952, for declaratory orders.

tained, needlessly and vexatiously, by the primary defendants and others in combination with them in order to make more complete the boycott and to drain Seatrain of its financial resources and the energies of its executive officers thereby to weaken Seatrain's operation and development." (P. 11 of Volume 2 of petition of December 10, 1952, for declaratory orders.)

The Court also properly recognized that:

"Seatrain has engaged in many controversies before the Interstate Commerce Commission and in the review of five of its decisions before the courts. Seatrain views as futile any further appeal to the Commission since it has repeatedly determined that its jurisdiction to compel access to freight cars is limited to through routes between rail and water carriers established pursuant to its order or voluntarily." (Pp. 19-20 of Volume 2 of petition of December 10, 1952, for declaratory orders.)

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"It is true that the Interstate Commerce Commission has announced a limitation upon its power to direct the interchange and use of railroad cars to Seatrain, as in *Investigation of Seatrain Lines, Inc.*, 206 I. C. C. 328, and that it has also made definitive rulings governing conditions under which the cars were to be used, *Hoboken Manufacturers Railroad Company* v. *Abilene & S. Railway Company*, 248 I. C. C. 109. It is likewise true that Seatrain has made no application to the Commission for a more general use of cars since the decision of the United States Supreme Court in *United States* v. *Pennsylvania R. Co., supra*, in 1945. The pronouncements of the Commission heretofore made are not so final but that in the light of the latter decision it could

> re-examine them under its continuing jurisdiction over its orders pursuant to the provisions of section 16(6) and 17(6), 49 U. S. C., Sec. 16(6) and Sec. 17(6)." (Pp. 27-28 of Volume 2 of petition of December 10, 1952, for declaratory orders.)

In directing Seatrain to again seek its relief from the Interstate Commerce Commission, the Court was constrained to find:

> "It is indeed regrettable that Seatrain should have been exposed to such time-consuming procedures in airing its problems administratively and in the courts." (P. 31 of Volume 2 of petition of December 10, 1952, for declaratory orders.)

It is clear that Seatrain, after having been "exposed to such time-consuming procedures in airing its problems administratively and in the courts" under and pursuant to the provisions of the Interstate Commerce Act, should be hesitant about again becoming involved in time-consuming procedures before the very administrative body that repeatedly has held that it lacked appropriate jurisdiction, unless and until it first be determined that further activity before that body would not be futile because of lack of appropriate jurisdiction. Seatrain likewise would be hesitant about again being involved in a proceeding before that administrative body, so long as it is unaware of the provisions of the Act that now are said to confer unlimited jurisdiction. In the absence of that knowledge, Seatrain obviously would be unable to make allegations and submit proof consonant therewith that would appropriately constitute the rational basis for proper findings and orders by this Commission.

From all of the foregoing, it is patent that the petition herein is properly filed; that the Commission should affirmatively act upon that petition and that the Commission

should issue the declaratory orders sought, based upon the petition, the briefs and the replies thereto, filed herein.

Conclusion and Request For the Issuance of Declaratory Orders.

The petition for the issuance of declaratory orders, the briefs, and the reply brief directed thereto inexorably depict the existence of controversies and uncertainties as to the proper tribunal to, and the appropriate authority under which, Seatrain may proceed to obtain the relief to which it is entitled. The exercise of the discretionary power with which the Commission is vested by Section 5(d) of the Administrative Procedure Act clearly would terminate those existing controversies and eliminate the current uncertainties.

Accordingly, Seatrain renews its request that the Commission exercise the powers vested in it by Section 5(d) of the Administrative Procedure Act and, by declaratory orders which will "terminate a controversy or remove uncertainty," answer the following queries:

> 1. Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to award reparation for damages resulting from the utilization of available administrative and court procedures, in bad faith or without probable cause, knowingly or recklessly misrepresenting facts therein and making misleading statements of facts therein, multiplying and protracting proceedings thereunder, in bad faith or without probable cause, not for the purpose of obtaining settlement of issues but with the intended effect of continuing and creating doubts and uncertainties, all for the purpose of preventing future diversion of all-rail traffic to Seatrain?

2. Has the Interstate Commerce Commission the requisite authority, and if so under what specific provisions of the Interstate Commerce Act, to require railroads which do not participate in and maintain through routes with Seatrain to permit interchange of their freight cars with Seatrain and permit the use of such freight cars in connection with transportation via Seatrain in interstate commerce?

Respectfully submitted,

SEATRAIN LINES, INC.,
15 Broad Street,
New York 5, New York,

By: S. S. EISEN,
140 Cedar Street,
New York 6, New York,
Its Attorney.

March 6, 1953

Certificate of Service

I hereby certify that I have this day served a copy of the foregoing document upon all parties to this proceeding by mailing a copy thereof to each party of record.

Dated at New York, New York, this 4th day of March, 1953.

S. S. EISEN.